In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-700

THOMAS A. MOTTO, JR., PETITIONER

v.

THE GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The Back Pay Act provides that a reinstated employee is entitled to the pay and allowances that he normally would have earned had he not been wrongfully discharged, "except that the employee may not be credited * * * leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation" (5 U.S.C. 5596(b)). Petitioner contends that the court of appeals erred in not ordering that he be paid the monetary equivalent of the leave he would have accrued beyond the maximum amount of leave authorized.

On February 12, 1967, petitioner was discharged from his employment with the General Services Administration. The district court found that the discharge was wrongful, and it ordered petitioner reinstated with back pay (Pet. App. 4-5). At the time of his discharge petitioner had been paid $950.40 as a lump sum payment for 240 hours of accumulated leave. Upon reinstatement, the $950.40 was deducted from the court's award and petitioner was recredited with 240 hours of accumulated leave, plus the annual leave accrued during the then current year *(id.* at 14-15). Petitioner moved the district court to amend its judgment so as to require that petitioner be permitted to retain the $950.40 and be paid the monetary value of the additional leave he would have earned during the period of separation *(id.* at 16). The district court denied the motion *(id.* at 16-19), and the court of appeals affirmed *(id.* at 1).

Petitioner contends that the Back Pay Act authorizes payment to him of the monetary equivalent of earned leave beyond the leave that he can lawfully accrue, and that it authorizes as well his retention of the lump sum payment made upon his discharge. The contentions are without merit and have consistently been rejected. See *Ainsworth* v. *United States,* 399 F. 2d 176, 183-185 (Ct. Cl.), and cases cited therein. As the Court of Claims explained in *Ainsworth,* had petitioner continued in government service, he would not have received the monetary equivalent of his annual leave, and there is no basis in the Back Pay Act for converting accumulated hours of annual leave into a monetary equivalent. Deduction of the previously received lump sum payment was also proper, because petitioner would not have received that payment if he had not been discharged. When he was restored to his position, his right to the lump sum payment no longer existed.

Ainsworth is dispositive of petitioner's contentions. That case was properly relied upon by the district court here, and the court of appeals' affirmance was correct.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.